IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 755 of 1982

For Approval and Signature:

Hon'ble MR.JUSTICE KSHITIJ R.VYAS
and
Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? :

STATE OF GUJARAT

Versus

VISNAGAR TAL. MAJOOR SAHAKARI MANDLI LTD.

Appearance:

1. First Appeal No. 755 of 1982
MR. R.M. CHAUHAN, AGP, for Petitioner No. 1
MS MAYA N BHAVNANI WITH MR. G.T. DAYANI for
Respondent No. 1

CORAM : MR.JUSTICE KSHITIJ R.VYAS
and
MR.JUSTICE K.M.MEHTA

Date of decision: 19/07/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE K.M.MEHTA)

1. The State of Gujarat-appellant-original defendant has filed this First Appeal under Section 96 of the Code of Civil Procedure, 1908 against judgement and decree dated 30.1.1982 passed by the Joint Civil Judge (Senior Division), Surat in Special Civil Suit No. 135 of 1976 filed by M/s. Visnagar Taluka Majoor Sahakari Mandli Ltd. The learned judge by his impugned judgement and decree has partly allowed the suit of the plaintiff for a sum of Rs. 1,42,742.11 paise with 6% running interest from the date of the suit till realisation.

2. The facts giving rise to this appeal are as under:

2.1 The plaintiff is a co-operative society registered under the Gujarat Co-operative Societies Act, 1961. The State Government has awarded contract for constructing the Hand Regulator Dam at Ukai to the plaintiff. The said contract was completed by the plaintiff and there is no dispute regarding its completion. However, as regards the present dispute the plaintiff has stated in the complaint that there are two items namely item No. 15 and item No. 16 in Schedule B of the Tender agreement pertaining to "uncoursed rubble masonry in cement Surkhi sand (0.80.2:5) mortar including watering, finishing to be required shape and better including necessary scaffolding with all leads and lifts and uncoursed rubble masonry in cement surkhi sand (0.8:0.2:3) mortar for u/s. face of the dam including watering, finishing to be required shape and better including necessary scaffolding with all leads and lifts etc.

2.2 It was further submitted that necessary specifications of the two items provide 21 days for curing of the water. However, during the course of the execution of work, the plaintiff was instructed by the Executive Engineer to provide curing for 90 days instead of 21 days. The plaintiff therefore demanded Rs. 12/extra for brass for curing masonry vide plaintiff's letter dated 1.10.1973. It was stated that total work executed by the plaintiff was 61267.617 c.ms. equivalent to 21650 brasses. The plaintiff was assured by the defendant that the plaintiff would be paid extra items of the work. However, the extra items of work was not included in the final bill and therefore the plaintiff accepted the final bill under protest on 28.9.1973.

2.3 It is the case of the plaintiff that the plaintiff carried out the correspondence for sanction of the amount but ultimately the Executive Engineer, Ukai Division No. IV, Ukai, as per his letter dated 29.12.1975 rejected the demand of the plaintiff.

2.4 As the defendant rejected the demand for extra payment the plaintiff addressed a notice under Section 80 of the Code of Civil Procedure on 27.1.1976. Thereafter, the plaintiff filed present suit on 21.5.1976 praying for a decree of Rs. 2,59,788/- in favour of the plaintiff against the defendant together with interest at the rate of 12% from the date of the suit till realisation.

2.5 The defendants filed written statement Exh. 12. They had admitted that the plaintiff has carried out the work as alleged by it in the plaint. They have also admitted that the description of item Nos. 15 and 16 as per Schedule B of the Tender Agreement is also correct. In para 6, the defendants have stated that specification provides that curing was to be done at least for 21 days minimum but in fact, curing was required to be done till specified strength is obtained and accordingly, it was obligatory on the part of the plaintiff to do curing work for 90 days i.e. 69 days more. The defendants further stated that as per the detailed specifications of masonry work stated in tender agreement, the crushing strength of mortar cubes of proportion).8:0.2:5 by weight at 28 days should be 1200 P.S.I. per square inch and that of cubes of proportion 0.8:0.2:3 by weight shall be 1600 P.S.I. It was further stated that as per specifications for curing of masonry, masonry was to be watered for a period of not less than 21 days from the date of building in place which means that in case the required strength or mortar is not obtained after curing for 21 days they would be required to cure the masonry for a further period as may be required so as to get the required strength. It is further stated that according to the defendants the specifications do not stipulate the curing period to be only 21 days as seems to have been presumed by the contractor, namely, the plaintiff. It was further stated that the plaintiff was never assured that he will be paid extra item in question. It was further stated that the plaintiff had not accepted final bill under protest and therefore the plaintiff was not entitled to claim extra rate thereafter. It was further stated that the question of accruing benefit did not arise in the case because it was their duty to see that curing was done till the requisite strength was obtained. In view of the same, it was stated that the plaintiff was not entitled to any claim in this behalf.

3. Before the trial court on behalf of the plaintiff, Shri Ranchhod Ambaram Patel, a person who was working in the society has been examined (at exh. 54). He has specifically stated that the society has done curing work for 90 days. He has stated that it was done in view of the oral instructions of the Deputy Engineer in this behalf. It was stated that they have already addressed a letter dated 1.10.1973 immediately for extra work. It was stated that for extra work, the society has made further correspondence with the Government and he has produced a letter dated 24.2.1975 at Exh. 61, Exh. 62 letter dated 8.8.1975 addressed to the Executive Engineer and Exh. 63 letter dated 29.12.1975 addressed by the Executive Engineer and Exh. 64 notice addressed to the Government. The plaintiff has also addressed a letter to produce all these correspondence but the Government did not produce the same. In cross examination he has admitted that there is no written order to the plaintiff to carry out the work for 90 days. However, he has stated that there was actual consideration and the society has worked for 90 days and for this the society has claimed amount in this behalf.

3.1 The plaintiff has also examined Prafulbhai Manubhai Gandhi, an Engineer of National Engineering and Construction Company Pvt. Ltd. Exh. 92. It is the case of the plaintiff that similar work was entrusted to the said Company and there was also difference and dispute between the Government and the Company and the said dispute was referred to be Arbitrator and the Arbitrator has given an award at Exh. 95. The said witness has produced the award in this behalf. There was also similar dispute. The said Engineering Company was supposed to work for 21 days and they had worked for 90 days and ultimately the Arbitrator has awarded extra amount which the Government has accepted and they had received the amount. It is the case of the plaintiff that as per the analogy of the said award the plaintiff should also be awarded the same. He has not been cross-examined by the Government in this behalf.

4. On behalf of the defendant State Maheshchand Chimanlal Desai was examined (at Exh. 109). He was a Deputy Secretary in the Government. He was in charge of the work. He has specifically stated that there was no written order for carrying out extra work by the plaintiff. He has admitted the award given in the case of National Engineering and Construction Co. Pvt. Ltd. produced at Exh. 95. The defendant has also examined the Chief Engineer of the Irrigation Work. He has stated that the plaintiff has not worked for 90 days curing in

this behalf.

5. The plaintiff has also produced necessary documentary evidence to substantiate his case for the claim. However from the record it appears that the defendant has not produced any documentary evidence in spite of the fact that the plaintiff has called upon defendant to produce certain documentary evidence particularly notices at Exh. 29, 40.

6. The learned judge has considered oral and documentary evidence in this behalf. The learned judge therefore held that the plaintiff proved that the Executive Engineer directed to provide curing for 90 days instead of 21 days. The learned judge has passed decree for a sum of Rs. 1,42,742.11ps. with 6% interest from the date of the suit till realisation.

7. Mr. Chauhan, learned A.G.P. for the State has tried to assail the judgement of the learned judge. He stated that when the plaintiff has already accepted the final bill without any protest, the plaintiff now cannot lodge subsequently any regarding extra work. The plaintiff ought to have submitted the said claim along with the final bill. As the plaintiff has not lodged his claim for extra work in the final bill, to that extent the plaintiff has waived his right to obtain extra item.

8. The learned A.G.P. has also submitted that, admittedly, from the record of the case the Government has established that there was no written order to the plaintiff to do the work for 90 days and in absence of any specific instruction even if the plaintiff has carried out the same, the Government is not responsible for the same and the Government is not bound to pay for the same.

9. Mr. Sukhwani, learned counsel for the respondent appeared and he has supported the judgement and decree of the learned judge.

10. We have gone through the evidence both oral as well as documentary on record and the reasoning of the learned judge. In our view in the evidence of Prafulbhai Manubhai Gandhi, the Managing Director of National Engineering and Construction Co. Pvt. Ltd., Rajkot at Exh. 91 he has specifically stated that dispute arose between the Construction Company and the Government and the matter was referred to the Arbitrator. The Arbitrator has given the award for the work of 90 days curing and in fact the Government accepted the same and

paid the amount. The claim of the plaintiff is similar to the case of Construction Company and therefore the plaintiff has clearly proved his case by producing oral evidence as well as the award at Exh. 95. In our view there is no reason to make discrimination between the National Engineering Construction Company Pvt. Ltd. and the plaintiff particularly when the facts, circumstances and the dispute are almost identical.

11. In our view the plaintiff has already given notices at Exh. 20, 29, 40 to the defendant to produce necessary correspondence to show that the plaintiff has worked 90 days instead of 21 days curing. In spite of the aforesaid notices, the defendants failed and neglected to produce necessary documentary evidence. In view of the same, we are of the view that adverse inference must be drawn against the defendants that the said documents contained instructions regarding work for 90 days instead of 21 days.

12. In our view it was the duty of the Government to produce the relevant original documents which are in their custody and possession to justify their case that what has been stated by the plaintiff is not correct. However, the defendants failed and neglected to produce the said documents in this behalf. It is presumed that the original records support the plaintiff's case if the same are produced. Even the Government has not given any cogent and convincing explanation for non-production of the records in this behalf.

13. We have also considered the pleadings in this behalf and even in written statement the defendants have not specifically denied that the plaintiff did not do curing for 90 days. In our view it was the duty of the Government to specifically deny the case of the plaintiff in the written statement. This is one of the additional ground on which the claim of the plaintiff can be allowed and the stand of the Government cannot be believed.

14. The plaintiff in its evidence particularly the evidence of Ranchhodbhai Ambaram Patel has specifically stated that the plaintiff has done extra work for which the plaintiff has carried out necessary correspondence. However, Ranchhodbhai Ambaram Patel was cross-examined by the defendant and he has produced necessary correspondence in this behalf. However, the defendant has not produced any other letter denying the contention of the plaintiff. He has also considered the evidence of defendants which we have referred to earlier. From the evidence on record it appears that it is no doubt true

that there was written instructions from the Government to the plaintiff for doing curing work for 90 days. However, from other oral as well as documentary evidence which has been produced by the plaintiff and which has not been denied by the defendants in its documentary evidence, we are of the view that the plaintiff has proved its case beyond doubt that curing was done for longer period of 69 days more and the plaintiff is able to establish the said claim in this behalf.

15. Regarding quantum of the work - The plaintiff has claimed Rs. 12/- per brass for 216;49 brasses equivalent to 61267.613 c.ms. In the alternative the plaintiff has claimed rate of Rs. 2.33 ps. per c.ms. awarded to the National Engineering Co. Pvt. Ltd. and if calculated at this rate, the amount comes to Rs. 1,42,742.1 ps. It is true that the award at Exh. 95 is not binding to the court, even then it is a relevant, important piece of evidence which in similar circumstances and facts cannot be ignored. We are therefore of the view that the plaintiff is entitled from the defendants for the extra work that the plaintiff has done.

16. The plaintiff has claimed 12% running interest on decretal amount from the date of the suit till realisation. However, the learned judge has granted 6% interest. Looking to the facts of the case we are of the view that the interest at the rate of 6% granted by the learned judge is reasonable, legal and valid. We do not see any reason to interfere with the same.

17. In view of the above observations, the judgement and decree of the learned judge awarding a sum of Rs. 1,42,742.11 ps to the plaintiff with 6% interest from the date of the suit till realisation is confirmed.

18. It is no doubt true that the plaintiff has submitted his final bill and the same has been accepted by the defendants and payment has been made by the defendants which has been accepted by the plaintiff without any protest. However, immediately after receiving payment on 1.10.1973 the plaintiff addressed a letter about the present claim and thereafter also the plaintiff addressed letters dated 24.2.1975, 8.8.1975 at Exh. 61 and 62. The defendants had refused the claim vide their letter dated 28.12.1975. The plaintiff has called upon the defendants to produce all the correspondences as to how the defendants have denied the claim of the plaintiff. However the defendants failed and neglected to produce any evidence on record. In view

of the aforesaid facts and circumstances of the case, it is no doubt true that the plaintiff has accepted the final bill without any protest and only after that he has lodged claim for extra work and also made correspondence with the defendants and the defendants rejected the claim. In view of the peculiar facts and circumstances of the case we are of the view that the claim made by the plaintiff is just and valid. The contention taken by the defendants that as the final bill has been accepted by the plaint without protest, the plaintiff is not entitled to make any subsequent claim is not legal and valid in view of the fact that the plaintiff has immediately lodged the claim and the defendants have not produced anything in this behalf. We do not see any merit in the contention of the Government in this behalf.

In the result, appeal fails and is dismissed. The order passed by the learned judge is confirmed.

(K.R. VYAS, J)

(K.M. MEHTA, J)

(pkn)